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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. SHIRILVIN DWAYNE HODGES, Defendant and Appellant.	2d Crim. No. B171277 (Super. Ct. No. BA05391) (Los Angeles County)

Shirilvin Dwayne Hodges appeals his conviction, by jury, of kidnapping Denise S. (Pen. Code, § 207, subd. (a)[1]), three counts of forcible oral copulation (§ 288a, subd. (c)(2)), two counts of assault with a firearm on a person (§ 245, subd. (a)(2)), and possession of a firearm by a felon. (§ 12021, subd. (a)(1).) The jury further found that appellant personally used a firearm in committing all but the firearm possession offense (§§ 12022.3, subd. (a), 12022.5, subd. (a), (d), 12022.53, subd. (a)), and that he had suffered three prior serious felony convictions. (§ 667, subd. (a)(1).) The trial court sentenced appellant as a third strike offender to a total term in state prison of 230 years to life. Appellant contends his conviction must be reversed because the victim's testimony is too inherently improbable to constitute substantial

[1] All statutory references are to the Penal Code unless otherwise stated.

evidence, because the trial court violated Evidence Code sections 1101, subdivision (b) and 1108 when it admitted evidence of appellant's 18-year old conviction of a sex crime, because the trial court erroneously excluded evidence of the victim's outstanding arrest warrant for prostitution and because it instructed the jury with the 1999 version of CALJIC No. 2.50.01. In a supplemental brief, he contends the trial court erred under *Blakely v. Washington* (2004) 542 U.S. ____ [124 S.Ct. 2581, 159 L.Ed.2d 403], by imposing upper and consecutive terms based on facts not found by the jury. We affirm.

Facts

Denise S., a habitual rock cocaine user and part-time prostitute, was sleeping off a cocaine binge with her friend Wallace Johnson in a Los Angeles hotel room when appellant kicked down the door and hauled her out of bed, complaining that she owed him money for drugs. Appellant dragged the naked Denise, at gun point, from the room, down the stairs, and into the hotel parking lot. Denise yelled for help, but no one responded. Co-defendant Janice Hagans drove appellant's red pickup truck closer to the bottom of the stairs and appellant forced Denise into the bed of the truck. He got behind the wheel and drove off.

Trinidad Vera, a resident and employee of the hotel, heard a woman yelling for help at about 2:00 or 3:00 that morning. When Vera looked out her window, she saw a red pickup truck drive out of the parking lot. She thought she heard the same woman yelling as the truck drove away but she did not see anyone in the truck bed. Vera did not call police because the truck was already gone. About 15 minutes later, Johnson came to the hotel office and asked to move to another room. When Vera and her brother, who also worked at the hotel, inspected the room Johnson vacated, they noticed that the door was broken "from the lock" and that a woman's clothes and other property were still inside.

Meanwhile, appellant was driving the pickup truck back to his residence. When he stopped at a red light, Denise jumped out of the truck bed and began to run away. Appellant chased after her, shooting at her twice and telling her to stop. She

complied. When she returned to him, appellant hit Denise in the head with the gun. He dragged her back to the truck and forced her into the cab where she knelt on the floor between him and Janice. As they drove, appellant said several times that he "ought to shoot" Denise. Denise asked Hagans why they were doing this to her and Hagans replied that she had to "stick by her man."

After driving for awhile, appellant stopped the car. He put a jacket over Denise's head and told her to bend over while they walked from the truck to a house. Once inside, appellant began to beat Denise on the back with a metal pipe and a black flashlight. He again said that he ought to shoot her in the head. Denise curled up on the floor and cried a lot because she was in pain. Hagans told appellant he should stop beating Denise because they could take her to a truck stop and make her pay back her debt by working as a prostitute. Appellant told Denise to take a bath and clean herself up. He followed her into the bathroom and stood watch with the pipe and gun as she complied. As she bathed, appellant again said that he should kill her. When she finished, appellant gave Denise a green T-shirt to put on. Appellant hit her again and she fell to the floor, curling up in a ball in a corner near the bathroom. Meanwhile, Hagans injected some heroin and then smoked some cocaine. She offered some of the cocaine to Denise who declined. Appellant told her to smoke the cocaine and she did.

After Denise smoked the cocaine, appellant told her to orally copulate Hagans. When Hagans said she wasn't interested, appellant started beating Denise again. He told Hagans he would keep hitting Denise until Hagans complied. She did. Denise orally copulated Hagans. After she finished, Hagans and appellant had sexual intercourse. Then, appellant forced Denise to orally copulate Hagans again. Hagans pushed Denise away after a few minutes and went to take a bath. While she was gone, appellant forced Denise to orally copulate him.

A woman who lived next door to appellant was awakened by the sounds of a loud argument coming from his house. The neighbor heard a man speaking angrily to a woman who was screaming and sounded scared. She could see the shadow of a nude man move in front of the window and she heard more angry and

scared voices. At that point, the neighbor drove to a phone booth and called police. They arrived at appellant's house while Denise was still performing the final act of oral copulation.

Denise asked the police officers to help her. She appeared to the officers to be cowering, nervous and a little afraid. They took her outside where she told them what had occurred. Inside the house, an officer recovered a black flashlight and a black metal pipe among the bedding in appellant's bedroom. Appellant and Hagans were arrested. A search of the house conducted the next day disclosed a .38 caliber handgun like the one Denise described hidden in a bedroom closet.

Denise was interviewed by police officers at appellant's house and again the next day, at the hospital. These statements were consistent in describing many of the major events that occurred: the kidnapping, Denise's near escape, the drive to appellant's house, the fact that appellant beat Denise with a metal pipe, and the forced oral copulations. However, they also differed in some respects from one another and from Denise's testimony at trial. For example, in one statement, Denise said she was wearing a white tank top when appellant pulled her from the bed in the hotel room, and that he ripped the shirt off her while dragging her from the room. In another statement, she said she was naked the entire time. In one statement, she said she was dragged from the room to the truck; in another, she said she walked part of the way. Denise consistently maintained that appellant hit her with the gun and a metal pipe, that he made her take a bath and that he forced her to perform two acts of oral copulation on Hagans and one on himself. In her various statements, she said these events occurred at different times during her ordeal. The medical examination of Denise disclosed an abrasion on her back that was linear in shape and very painful. It did not document other injuries that might be caused by a lengthy and severe beating such as the one she described to police. The sexual assault examination did not show sperm or other genetic material linked to appellant. A sample of a dried secretion taken from the area of Denise's lip matched Denise but excluded appellant and Hagans.

Appellant testified that he went to the hotel room because a woman told him that Denise was looking for him. She left the hotel with appellant voluntarily and was disappointed to see Hagans in the pickup truck. Denise was looking for drugs. She asked to hang out with appellant and Hagans, and they agreed. At some point, after they'd taken some drugs, Hagan and appellant were going to have sex. A fight started between Hagan and Denise because Denise wanted either to join them in the bedroom or have some more drugs. Appellant was trying to separate the women and get Denise out of the bedroom when the police arrived. He claimed that the metal pipe and flashlight were found in the kitchen not the bedroom, and that he had never seen the gun before. He denied hitting Denise and testified that she did not orally copulate him or Hagan that night.

Wallace Johnson could not be located to testify at trial. In support of appellant's motion for new trial, however, Johnson submitted a declaration in which he stated that he was asleep when appellant walked into the hotel room without breaking down the door. Johnson went into the bathroom and when he emerged, Denise was fully dressed and voluntarily leaving with appellant. She took her belongings with her. She was not naked and she was not screaming.

Denise also testified in support of appellant's motion for new trial. In essence, she repudiated her trial testimony, saying that she did not remember the events when she testified at trial but was instead testifying based solely on the police reports shown to her by the prosecutor and the investigating detective. Denise stated that she was intoxicated when the police arrived at appellant's house and that she lied to them to avoid arrest. She agreed to testify against appellant because the detective said that appellant would try to kill Denise if he was released from jail. The detective also promised to give Denise an airplane ticket out of Los Angeles but did not keep that promise. Denise spoke with appellant's counsel and signed the declaration after she was visited in jail by a mutual friend of her and appellant's. After their visit, the friend deposited money into Denise's jail account.

Discussion

Substantial Evidence

Appellant contends that Denise's testimony was too marginally corroborated, inconsistent, contradictory and inherently improbable to constitute substantial evidence that the offenses actually occurred. We briefly restate the familiar standard of review governing this claim: We review the entire record to determine whether it contains evidence that is reasonable, credible and of solid value on the basis of which any rational trier of fact could have found appellant guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We view the evidence in the light most favorable to the judgment and presume in support of the judgment every fact the trier could reasonably deduce from the evidence. (*Id.*)

The testimony of a single witness is sufficient to support a criminal conviction, unless there exists " 'a physical impossibility that [the statements given by the witness] are true' " or their " 'falsity [is] apparent without resorting to inferences or deductions.' " (*People v. Thornton* (1974) 11 Cal.3d 738, 754, quoting *People v. Huston* (1943) 21 Cal.2d 690, 693.) Inconsistencies or improbabilities in the testimony of a witness who has been believed by the jury do not justify a reversal for lack of substantial evidence because, "it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which that determination depends." *People v. Jones* (1990) 51 Cal.3d 294, 314.) We may not re-weigh the evidence or substitute our evaluation of it for that of the fact finder. (*Id.*)

The judgment here is supported by substantial evidence. Although Denise's trial testimony was inconsistent with some of her prior statements and at times with itself, she always maintained that she was taken from the hotel room against her will, shot at during her attempted escape, hit with the pipe and the gun, and forced to orally copulate both Hagans and appellant. The jury could lawfully find her testimony on these matters credible, even if some of her other statements were not. Many aspects of her testimony were also corroborated. The hotel clerk, Trinidad Vera,

heard a woman screaming in the parking lot that night as a red pickup truck left the parking lot. She also observed damage to the door of Denise's hotel room and a woman's belongings left behind. The metal pipe and flashlight were found in appellant's bed and the gun in one of his closets. Drug paraphernalia were also recovered from the bedroom, corroborating Denise's claims about drug use. Appellant's neighbor was so frightened by the hostile and scared voices she overheard from his house and the movements she could see through his window that she telephoned police, corroborating the nonconsensual nature of the events occurring in the house. When police arrived, Denise's demeanor and statements were consistent with those of a crime victim. Based on this evidence, a rational trier of fact could have found appellant guilty beyond a reasonable doubt.

Evidence of Prior Conviction

In October 1984, appellant was sentenced to 25 years in prison for various sexual assaults committed on December 21, 1983, against Donna W. He was paroled from prison on April 18, 2000, having served nearly 16 years of that sentence. The crimes at issue here occurred about 90 days later, on July 26, 2000.

Briefly stated, the prior offenses involved Donna W. who got into a car with her friend Derrick Smith and appellant, who was a stranger to her. They drove around for awhile and then, at appellant's direction, Smith parked in a remote area near some factories. Appellant forced W. to orally copulate him and then raped her. He then told her to have sex with Smith. Smith pretended to comply. The group drove back toward W.'s house. Along the way, appellant discussed killing W. to prevent her from identifying him. Smith convinced him not to do so. When they arrived at W.'s house, appellant said he wanted "some more," so he had Smith drive the car around the corner where he again raped W. When they returned to W.'s house, she saw someone on the street and yelled for help. Appellant hit her in the face while holding a "D" battery in his hand and choked her into unconsciousness. When she woke up, she was in the back seat of the car and she was naked, although she did not remember

removing her clothes. Appellant finally allowed Smith to return to W.'s house where she was released.

Evidence of appellant's prior offenses was admitted pursuant to Evidence Code sections 1101, subdivision (b) and 1108. The trial court concluded that the prior offenses were admissible under Evidence Code section 1101, subdivision (b) to show "modus operandi, lack of mistake, [and] intent on the part of the perpetrator . . . ." They were admissible under section 1108 to show appellant's propensity to commit sex crimes because the prior offenses were not unduly prejudicial under Evidence Code section 352. Appellant contends the trial court erred because the prior offenses were too remote in time and because they were not sufficiently similar to the charged crimes. We disagree.

First, the prior convictions are not stale or remote. Appellant was incarcerated during most of the intervening period and committed the charged offenses only about 90 days after his parole. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1056, quoting *People v. Beagle* (1972) 6 Cal.3d 441, 453.)

Second, the trial court did not abuse its broad discretion when it determined that appellant's prior offenses were sufficiently similar to the charged crimes to be admissible under Evidence Code sections 1101, subdivision (b) and 1108. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911; *People v. Carpenter* (1997) 15 Cal.4th 312, 380.) During both criminal episodes, appellant used an automobile and an accomplice to transport his victim to an isolated located. In both instances, he forced the victim to engage in oral copulation. The sex crimes were committed while an accomplice was present. In addition, in both cases appellant instructed the victim to have sex with the accomplice while he watched. Illegal drugs were used on both occasions. Appellant beat and threatened to kill both victims. These similarities render the prior offenses relevant to prove among other disputed facts, intent, absence of mistake as to the victim's consent and a common plan or "modus operandi" to kidnap and sexually assault women. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403; *People v. Balcom* (1994) 7 Cal.4th 414, 424-425.) For the same reason, the prior

offenses are relevant to demonstrate appellant's disposition to commit sex offenses. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1009.)

Nor was the prior offense evidence unfairly prejudicial or otherwise inadmissible under Evidence Code section 352. Given the substantial similarity between the current and prior offenses, evidence of the prior offenses had high probative value. The evidence was not unfairly prejudicial because those offenses were no more brutal or inflammatory that the charged crimes. (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) There was no abuse of discretion. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070.)

Appellant contends that admission of propensity evidence under Evidence Code section 1108 violates his federal constitutional rights to due process and equal protection. These contentions have been waived because they were not raised in the trial court. (*People v. Williams* (1997) 16 Cal.4th 153, 250; *People v. Alvarez* (1996) 14 Cal.4th 155, 186.) Had they been preserved for review, we would reject them because we are bound by our Supreme Court's ruling to the contrary in *People v. Falsetta, supra,* 21 Cal.4th 803. The Ninth Circuit's opinion in *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, provides no basis for "reconsidering" *Falsetta* because, among other reasons, that decision was reversed by the United States Supreme Court in *Woodford v. Garceau* (2003) 538 U.S. 202 [155 L.Ed.2d 363].)

Exclusion of Victim's Outstanding Arrest Warrant

When these offenses occurred, Denise S. had an outstanding arrest warrant for prostitution. Appellant's trial counsel sought to introduce evidence of that warrant, on the theory that Denise fabricated the kidnapping, beatings and sexual assaults to avoid arrest. The trial court excluded the evidence based on Denise's testimony that she did not know the warrant was outstanding. Appellant contends this ruling deprived him of his Sixth Amendment right to confrontation.

Again, the contention has been waived because appellant failed to raise it in the trial court. (*People v. Alvarez, supra,* 14 Cal.4th at p. 186.) Had it been preserved for review, we would reject the claim because the proffered evidence was

not relevant. There was no evidence Denise knew she had an outstanding arrest warrant. As a result, there was no evidence she had an incentive to fabricate her victimization in order to avoid arrest. The enforcement of established, nonarbitrary rules of evidence – such as the rule excluding irrelevant evidence – does not violate the Confrontation Clause. (*United States v. Scheffer* (1998) 523 U.S. 303, 308 [140 L.Ed.2d 413]; *Taylor v. Illinois* (1988) 484 U.S. 400, 410-411 [98 L.Ed.2d 798]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) Finally, any error was harmless under either standard because Denise's testimony was thoroughly impeached even without the evidence of her arrest warrant. There is no reasonable probability that admission of this evidence would have materially affected the verdict. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.)

CALJIC No. 2.50.01

The trial court instructed the jury with the 1999 version of CALJIC No. 2.50.01, concerning its consideration of appellant's prior sexual offenses. Appellant contends the trial court erred because the instruction "conflates and confuses the standards of proof as well as suggesting the [Evidence Code] section 1108 evidence by itself may be dispositive proof of present guilt." Our Supreme Court rejected these contentions in *People v. Reliford* (2003) 29 Cal.4th 1007, 1012. We are bound by that ruling.

Blakely Error

In his supplemental brief, appellant contends the trial court erred under *Blakely v. Washington* (2004) 542 U.S. ____, *supra,*[124 S.Ct.2531, 159 L.Ed.2d 403], because it imposed upper term and consecutive sentences based on facts not found by the jury. Appellant is incorrect. The upper term and consecutive sentences were imposed based on appellant's status as a third strike offender and on his firearm use. The firearm use enhancements were the subject of jury verdicts and *Blakely* expressly holds that no such verdict is required to determine the fact of a prior conviction. (*Blakely v. Washington, supra,* 124 S.Ct. at p. 2536.) The fact that the trial court noted the presence of other aggravating factors does not constitute error or mandate a

remand for resentencing. (*People v. Osband* (1996) 13 Cal.4th 622,730 [single aggravating factor justifies upper term].) There was no *Blakely* error and any such error would have been harmless beyond a reasonable doubt. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 320.)

Conclusion

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Craig E. Veals, Judge

Superior Court County of Los Angeles

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